LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term 1970
No. 1575

ROBERT WILSON MORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certriorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM G. SMITH,
MICHAEL E. SOMERS,
DANIEL KALLEN,
DON ROSS BAY,
Attorneys for Petitioner.

MARGOLIS, McTERNAN, SMITH,
SCOPE & HERRING,
3325 Wilshire Boulevard,
Los Angeles, Calif. 90005,

SOMERS & KALLEN,
2512 Wilshire Boulevard,
Santa Monica, Calif. 90403,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional, Statutory and Regulatory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
Introduction	8
A. The Decision of the Courts of Appeals for the Fourth and Ninth Circuits Conflict on Whether or Not the Defendant Has a Right to Explain His Reasons for Refusing Induction to the Jury Trying Him for That Offense	8
B. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of 32 C.F.R., § 1625.2	16
Conclusion	19
Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Davis v. United States, 374 F. 2d 1	17
Ehlert v. United States, 422 F. 2d 333	8, 17, 18
Harris v. United States, 412 F. 2d 384	9, 10, 11
Heflin v. United States, 414 U.S. 418	7
Keene v. United States, 266 F. 2d 378	17
Martinez v. United States, 384 F. 2d 50, cert den. 390 U.S. 1016	17
Morissette v. United States, 342 U.S. 246	13, 14, 15
Mulloy v. United States, 398 U.S. 410	5
Porter v. United States, 334 F. 2d 792	18
Schacht v. United States, 398 U.S. 58	7
Stewart, Ex parte, 47 F. Supp. 415	15
Taglianetti v. United States, 394 U.S. 316	7
United States v. Ali-Majied Muhammad, 364 F. 2d 223	17
United States v. Blaisdell, 294 F. Supp. 1303	18
United States v. Bowen, 421 F. 2d 193	11
United States v. Brown, 129 F. Supp. 237	18
United States v. Bruinier, 1 S.S.L.R. 333	15
United States v. Garaway, 2 S.S.L.R. 3680	12
United States v. Geary, 368 F. 2d 144, cert. den. 389 U.S. 959	17, 18
United States v. Helm, 386 F. 2d 434, cert. den. 390 U.S. 958	17
United States v. Hinch, 292 F. Supp. 696	18
United States v. Hoffman, 137 F. 2d 416	16
United States v. Jennison, 402 F. 2d 51, cert. den. 394 U.S. 912	17

Page

United States v. Kurila, 1 S.S.L.R. 3356 15

United States v. Maine, 417 F. 2d 951 17

United States v. Mancuso, 139 F. 2d 90 16

United States v. Mulloy, 412 F. 2d 421 17

United States v. Murdock, 290 U.S. 389 15

United States v. Pritchard, ... F. 2d .... (9th Cir., Dec. 28, 1970) 5

United States v. Rabb, 394 F. 2d 230 15

United States v. Sandbank, 403 F. 2d 38 17

United States v. Shoebel, 201 F. 2d 31 18

United States v. Skinner, 1 Sel. Serv. L.R. 3042 18

United States v. Stafford, 389 F. 2d 215 17

United States v. Taylor, 351 F. 2d 228 17

United States v. Underwood, 151 F. Supp. 874 18

Welsh v. United States, 398 U.S. 333 5

Statutes

Code of Federal Regulations, Title 32, Sec. 1625.2 .....2, 3, 5, 16, 17

Code of Federal Regulations, Title 32, Sec. 1625.14 5

Military Selective Service Act of 1967, Sec. 6(j) 2

Military Selective Service Act of 1967, Sec. 12(a) 3, 6, 13

United States Code, Title 18, Sec. 3231 6

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 50, App. Sec. 301 15

United States Code, Title 50, App. Sec. 456(j) ..2, 19

Page

United States Code, Title 50, App. Sec. 462 9

United States Code, Title 50, App. Sec. 462(a) 3, 6, 8, 13

United States Constitution, Fifth Amendment 2, 8

United States Constitution, Sixth Amendment 2, 8

Textbook

Federal Jury Practice and Instructions Sec. 13.053 .. 10

IN THE

Supreme Court of the United States

October Term 1970
No. .....

ROBERT WILSON MORE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certriorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Robert Wilson More, respectfully prays this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 13, 1971.

Opinions Below.

The District Court did not render an Opinion or written findings. The Opinion of the Court of Appeals is not yet reported; it is set forth in the Appendix to this Petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 13, 1971. Petition for a rehearing was denied on February 15, 1971. Petitioner applied to Mr. Justice Douglas for an extension of time in which to file petition for Writ of Certiorari, which extension was granted to and including April 16, 1971. The juris-

diction of this Court is conferred by 28 U.S.C. §1254(1).

Questions Presented.

1. Does the United States Constitution require that a Selective Service registrant being prosecuted for refusing to submit to induction be permitted to explain his reasons for so refusing to the jury during trial, so to permit them to determine his specific intent or *mens rea* at the time of the alleged offense?

2. Does Selective Service Regulation 32 C.F.R. § 1625.2 preclude a local board from considering a registrant's claim of conscientious objection because it crystallized after the board ordered the registrant to report for induction?

Constitutional, Statutory and Regulatory Provisions Involved.

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . .

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

Military Selective Service Act of 1967, § 6(j); 50 U.S.C. App. § 456(j):

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form:

Military Selective Service Act of 1967, § 12(a); 50 U.S.C. App. § 462(a):

> . . . [A]ny person who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title, or rules, regulations or directions made pursuant to this title, . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or both such fine and imprisonment. . . .

Selective Service Regulations, 32 C.F.R. §1625.2:

> The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Statement of the Case.

The Petitioner, Robert Wilson More, was at all times herein, a registrant of Selective Service Local Board No. 85 of North Hollywood, California. He held II-S student deferments from April 15, 1964 to December 18, 1968, although he twice had to appeal intervening I-A classifications by the local board to obtain them. (S.S. F. 11, 12)[1]

[1]"S.S.F." refers to the Petitioner's Selective Service file introduced into evidence at the time of trial, which includes a file containing 130 consecutively numbered pages. It was made a part of the record on appeal. "R.T." will refer to the Reporter's Transcript of proceedings, "C.R." will refer to the Clerk's Record of pleadings and other documents.

After receiving a I-A classification December 18, 1968, Petitioner requested a personal appearance and appeal and an SSS Form 150 (Special Form for Conscientious Objectors) from his local board. (S.S.F. 12.) Petitioner timely completed and returned the Form 150 (S.S.F. 69-78), claiming a I-A-O classification as a conscientious objector. (S.S.F. 70.) The local board granted an appearance on March 19, 1969, and considered the claim made upon the Form 150. (S.S.F. 12.) At that time, the board voted 3-0 to reclassify Petitioner I-A-O.

The board mailed petitioner an order to report for induction on May 15, 1969 (the induction scheduled for June 17, 1969). (S.S.F. 12.)

On May 27, 1969, the local board received a letter from Petitioner requesting a postponement of his scheduled induction and a request for another "personal appearance before the Appeals Board to express my feelings since I recently received an induction notice." (S.S.F. 60.) In this letter he also indicated that he had made a re-examination of his conscience since the receipt of his induction order and now believed that "serving my country in an organization which uses violence as a means for an end would be contrary to my way of life and contrary to my moral beliefs." (*Id.*)

Petitioner was given a postponement and an "interview with [his] local board" (S.S.F. 62) on June 18, 1969. At this interview, a summary of which was prepared by the board's executive secretary and included in his file (S.S.F. 63), the local board questioned him as to his beliefs and made the following decision: "Reviewed not reopened on interview. Insufficient re-

ligious basis—purely his personal, sociological and political views, particularly relating to Viet Nam war. C.O. claim denied under Section 1625.2 and classification not reopened." (S.S.F. 63, *cf.* S.S.F. 12.)

(Interestingly enough, the board's decision would seem to be a *re-opening* and a determination that registrant was no longer entitled to *any* conscientious objector classification but rather a I-A.[2] But the board did not reclassify him I-A; instead it retained him in class I-A-O so as not to cancel his outstanding induction order.[3] Further, the board's decision, prior to this Court's recent *Welsh* decision[4] would seem to lack merit in denying the claim for "insufficient religious basis." This decision a board operating under 32 C.F.R. §1625.2 should not make. The board *is* required by Regulation 1625.2 to make a finding that there was no change in belief due to circumstances beyond the registrant's control. This the local board *failed* to do.)

Petitioner was re-ordered to submit to induction on August 12, 1969, by letter dated July 28, 1969. (S.S.F. 12.) The board on July 31, 1969, refused to postpone again petitioner's induction (S.S.F. 68, 13) when he requested to appear before them with evidence "gathered in support of my beliefs in the form of letters and people who have known me." (S.S.F. 66.) Petitioner missed the scheduled induction because of illness (S.S.F. 82, 91) and was rescheduled for induction on October 21, 1969, at the Los Angeles Armed Forces Entrance and Examining Station. At that time,

---

[2]*Cf. United States v. Prichard,* ....F. 2d .... (9th Cir., Dec. 28, 1970).

[3]*Cf.* 32 C.F.R. § 1625.14; *Mulloy v. United States,* 398 U.S. 410 (1970).

[4]*Welsh v. United States,* 398 U.S. 333 (1970).

Petitioner refused to submit to induction and, upon request of officials in charge of his examination and prospective induction, submitted a signed statement indicating why he had refused to submit to induction. (S.S.F. 103.) Among other things, he wrote "I do not believe that my actions here today are in violation of any law or social order." (*Id.*)

Petitioner pleaded not guilty and was tried in the Central District of California before the Honorable Judge E. Avery Crary with a jury for refusing to submit to induction in violation of § 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. § 462(a)). (Jurisdiction of the District Court was conferred by 18 U.S.C. § 3231). Motions for judgment of acquittal were made at trial [R.T. 84, 114, 117] incorporating points of law presented in defendant's trial memorandum [C.R. 45 *et seq.*] and other evidence advanced during trial. These motions were denied by the trial judge. [R.T. 104, 185.]

During trial, defense counsel attempted to introduce evidence, through testimony of the Petitioner and others, as to Petitioner's state of mind at the time of the commission of the alleged offense. This evidence was systematically excluded by the trial judge and not heard by the jury. [See, *e.g.*, R.T. 127-28; 129-32; 137-38; 142; 146-49; 151-52; 154.] This exclusion of evidence subsequently rendered a number of the petitioner's proposed jury instructions [C.R. 27-38, especially 29-31, 36, 37] irrelevant. [R.T. 198-220, especially 207-211, 216-219.]

After being instructed by the trial judge, the jury rendered a verdict of guilty and the court sentenced petitioner to imprisonment for a period of not more than three years. He was released upon his own recognizance pending the outcome of an appeal to the Ninth Circuit.

Soon after the judgment of the Court of Appeals, petitioner timely moved for a rehearing before the Ninth Circuit, which rehearing was denied on February 15, 1971. (Counsel did not receive notice of such denial until February 19, 1971.[5])

---

[5]Counsel prays that this Petition will receive due consideration despite the fact that the application for extension of time in which to file it *might* be considered untimely. *See, e.g., Heflin v. United States*, 415 U.S. 418 n. 7 (1959); *Taglianetti v. United States*, 394 U.S. 316, 317 n. 1 (1969); *Schacht v. United States*, 398 U.S. 58 (1970).

REASONS FOR GRANTING THE WRIT.

Introduction.

This case involves two issues, in each the Ninth Circuit has rendered a decision in conflict with the decisions of others of the Courts of Appeals. Resolution of these issues will affect a substantial number of cases currently in various stages of litigation.

The first issue, dealt with more specifically below, involves the constitutional right to a jury trial in accordance with the Fifth and Sixth Amendments to the United States Constitution, and the right to have such jury hear evidence concerning *mens rea,* and thereupon decide for itself the mental and intentional state of the defendant at the time of the commission of the alleged offense.[6]

The second issue is identical to that in which this court has heard argument in *Ehlert v. United States,* 422 F. 2d 333 (9th Cir., 1970), *cert. granted and decision pending* O.T. 1970.

A. The Decision of the Courts of Appeals for the Fourth and Ninth Circuits Conflict on Whether or Not the Defendant Has a Right to Explain His Reasons for Refusing Induction to the Jury Trying Him for That Offense.

One of the issues raised on appeal herein was the trial judge's consistent and systematic refusal to allow the defendant to explain to the jury his reasons for refusing induction. (See Appellant's Opening Brief at pp. 76-93; Appellant's Reply Brief at pp. 5-17.) The government erroneously concluded that the gravamen of

---

[6]The statute includes a scienter requirement—"knowingly"—to be discussed more fully below. See, 50 U.S.C. App. § 462(a).

the defendant's testimony would be his beliefs concerning the "legality" or "rightness" of the Selective Service law. (See Appellee's Reply Brief at p. 27, citing *Harris v. United States,* 412 F. 2d 384, 390 (9th Cir., 1969): "A person may not decide for himself whether a law is good or bad and if bad, that he is free to disobey it.") This was accepted by the Court of Appeals which affirmed the conviction and said the following:

> Exclusion of evidence concerning More's "good faith" in refusing induction was not error. More admitted that he 'fully intended not to step forward when [he was] ordered to.' This admission supports a finding of the requisite intent under 50 U.S.C. App. § 462. *Harris v. United States,* 412 F. 2d 384, 387-88 (9th Cir., 1969).

Slip opinion at page 3.

However, as defense counsel pointed out time and again, Petitioner's testimony would indicate that petitioner honestly believed his particular induction order did not place upon him the duty to submit to induction, and that, therefore, petitioner did not have the requisite specific intent (*viz:* "knowingly") required by statute.

In *Harris,* the defendant did not raise either a mistake of fact or mistake of law defense as was attempted in the instant case. Harris attempted, rather, to provide the jury with his views relating to war and conscription and the fact that they were sincerely held. The Court upheld a refusal to allow such testimony on two grounds. First, because the defendant cannot put the issue of the legality of war or conscription directly before the jury; it is a question of law and for the

Court to decide. Harris was not raising a "good faith" defense in the technical sense. He was merely asking the jury to find him not guilty on *moral* grounds alone, expecting the jurors directly to preempt the province of the trial court on matters of law. Second, the defense of a "good faith belief" in the unconstitutionality of that statute was inappropriate since the statute had been upheld many times previously. In the instant case, of course, the Petitioner did not urge or request the jury to find anything in the Act unconstitutional. On the contrary, he supported its validity and merely asked that the draft board comply with it. Thus, it is submitted that this limited issue decided by *Harris* should have no application to the instant case.

The *Harris* case also held evidence of good reputation to be inadmissible because appellant's credibility as a witness had not been attacked by the Government by any testimony that appellant's reputation for truth, honesty and veracity was had and, therefore, rehabilitation was unnecessary.

But the Court in *Harris* did *not* refuse to admit evidence of surrounding circumstances on the issue of specific intent. In fact, on page 389, the Court found the following to be a proper statement of the applicable law and the exact same language is now used in *Federal Jury Practice and Instructions,* Section 13.-053:

> Hence the motive of the defendant is immaterial *except insofar as the evidence of motive may aid in determining the state of mind, his state of mind or intent.*

(Emphasis supplied.)

Thus, the Court of Appeals' decision here in affirming on the facts presented or offered represents a significant departure from *Harris* and generally from the common law of *mens rea.* This will be discussed more fully below. (And see, *e.g., United States v. Goodman* (9th Cir., March 16, 1971), citing *More,* at slip op. p. 5.)

The decision of the Fourth Circuit in *United States v. Bowen,* 421 F. 2d 193 (4th Cir., 1970) directly contradicts the instant case insofar as it denies a defendant the right to explain to the jury his reasons for refusing induction. The entire portion of the opinion in *Bowen* dealing with this issue is printed hereafter:

> The one contention that we find meritorious is that at trial defendant was deprived of his right to defend himself.
>
> The essence of the charge against defendant was a willful failure to report for induction. At trial the defendant was permitted to state that he did not report for induction because he did not want to get into the army; he was not allowed the opportunity to explain why. When defendant was asked if he refused to report willfully, the prosecutor's objection to the question was sustained, and the court ruled that the question was one solely of law to be determined from the facts. Further interrogation of defendant at this point ceased.
>
> Although the record is replete with evidence of willfulness on the part of defendant in failing to report for induction, we think that he should not have been deprived of the opportunity to deny it, or to offer any possible explanation for his conduct. In short, while the right to answer the ques-

> tion posed to him may have availed him little, he should not have been denied that right; and his conviction can thus not be allowed to stand.

421 F. 2d at 197.

The District Courts have begun to express their dissatisfaction with the large array of Selective Service cases confronting them by treating such cases, on occasion, as "strict liability" cases with respect to the issue of specific intent.

Thus, the instruction by an impatient judge in *United States v. Garaway,* rev'd, 2 S.S.L.R. 3680 (9th Cir., April 21, 1970),

> "I, therefore, instruct you it is your duty as jurors to return a verdict of guilty. You may consider this matter and you may disregard my instructions, but I am instructing you as a matter of law that it is your duty to return a verdict of guilty as charged in the indictment."

or that in *O'Brien v. United States*[7] on appeal to the Ninth Circuit, No. 26643,

> "In this connection, I am commenting on the evidence in this case, as permitted by the law of the United States, and you do not have to accept the comments in your findings of the facts, if you believe the evidence of the defendant, his testimony, then I can tell you if you believe and you find that you believe the testimony of the defendant, then the defendant has made a judicial confession to the elements of the offense charged in the indictment."

---

[7]This instruction came after much testimony by the defendant which indicated he was confused about the legal effect of an induction order declared defective by the United States Attorney in Los Angeles about a year previously. Brief for Appellant at pp. 4, 37-38).

seem to represent a "new wave." Direction and guidance are needed by this court to re-establish the *scienter* element of "knowingly" into the Selective Service law before irremediable damage occurs below in the Circuit Courts. Such direction and guidance are also required by due process of law.

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. Appendix § 462(a)) establishes the element of "knowingly" as the *mens rea* requirement. The *mens rea* requirement in the crime charged dictates a showing of specific intent before a conviction may be obtained. This court, in the case of *Morissette v. United States,* 342 U.S. 246 (1952) indicated the proper province of the jury in passing upon "knowing" or "wrongful" intent. In that case, the defendant was convicted of "knowingly converting" government property. Mr. Justice Jackson stated in part as follows:

> The Court thought that the only question was, "did he intend to take the property?" That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defense testimony and all the surrounding circumstances.
>
> . . .
>
> Had the jury convicted on proper instructions, it would be the end of the matter. But juries are not bound by what seems to be inescapable logic to judges.

342 U.S. at 275-76.

> Had the statute applied to conversion without qualification, it would have made crime of all unwitting, inadvertent and unintending conversions. *Knowledge, of course, is not identical with intent and may not have been the most apt word of limitation, but knowing conversion requires more than knowledge that the defendant was taking the property into his possession.* He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or intent, would not seem to alter its bearing on guilt.

Id. at 270-71 (emphasis supplied).

Thus it can be drawn from the *Morissette* case the general proposition that the imposition of the *mens rea* requisite as a proper element of the offense removes any aspect of "strict liability" which might otherwise prevail (*e.g.*, did he have a duty to regsiter or submit to induction? Did he do so?) The defendant's "cognizance" of the fact that he was picking up and removing property was not a sufficient attribute of the *mens rea* requirement to allow a conviction to stand. The defendant had to know *more*. As Justice Jackson indicates, he had to *know* that he was *making a conversion*. In the instant case, the prosecution must show that defendant knew that he had an absolute legal duty to submit to induction (and, as we argue elsewhere, we do not believe that his knowledge of that duty was so clear) and that by failing to submit to induction, the defendant thus knew he was violating the law and "knowingly refused".

Just as *Morissette* discussed the mental element of knowledge, *United States v. Murdock,* 290 U.S. 389 (1933) discussed the mental element of "willfulness":

> The word often denotes an act which is intentional or knowing or voluntary as distinguished from accident. But when used in a criminal statute, it generally means an act done with bad purpose . . . without justifiable excuse . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right to act. . . .

290 U.S. at 394-95 (citations omitted).

The *Morissette* and *Murdock* cases explain the effect of Congress' choice of words "knowingly" and "willfully." (Indictments in Selective Service cases often use the terms "knowingly" and "willfully" interchangeably. See, for example, *United States v. Rabb,* 394 F. 2d 230 (3rd Cir., 1968); *United States v. Kurila,* 1 S.S.L.R. 3356 (6th Cir., 1969); *United States v. Bruinier,* 1 S.S.L.R. 333 (D. Ore. 1968); *Ex parte Stewart*[8], 47 F. Supp. 415, at 417 (D.C. Cal., 1942).)

In the *Stewart* case, cited parenthetically above, the court in passing upon the element of *scienter* in violation of the Selective Training and Service Act of 1940, 50 U.S.C. App. § 301 *et seq.*, said:

> However, because the statute uses the word 'knowingly' . . . which implies willful knowledge and specific intent, we have allowed defendants in Selective Service cases to give their reasons for failure to obey as going to intent.

---

[8]It is noteworthy that *Stewart,* now overruled by the Ninth Circuit's *More* decision, was cited with approval by Judge McAllister in dissent to the Sixth Circuit's *Morissette,* decision 187 F. 2d 427, 433 (6th Cir., 1951), overturned by this Court.

See, also, *United States v. Hoffman,*[9] 137 F. 2d 416, at 419 (2d Cir., 1943); *United States v. Mancuso,* 139 F. 2d 90 (3rd Cir., 1943) (*per* Goodrich, *J.*) (mistaken belief of defendant as to legal effect of civil litigation as affecting validity of induction order *held* exculpatory).

As can be seen, confusion reigns supreme among the circuits as to the specific intent required to convict one prosecuted under the Selective Service laws for refusing induction. This Court should exercise its certiorari power to clarify the problems the current case law has raised.

B. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of 32 C.F.R., § 1625.2.

In relevant part Selective Service Regulation, 32 C.F.R., § 1625.2, provides that a local draft board may not re-open a registrant's classification after the board has mailed to the registrant an Order to Report for Induction "unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The Ninth Circuit has here held that once an induction order has been issued to a registrant, a newly matured conscientious objection to war can never be a change in the registrant's status resulting from circum-

---

[9]*Hoffman* was also cited by Judge McAllister. See note 8 *supra.*

stances beyond his control. The Ninth Circuit first enunciated this interpretation of 32 C.F.R., § 1625.2, in *Ehlert v. United States,* 422 F. 2d 332 (1970) where the court conceded that whether the "crystallization" or "maturation" of a conscientious objection to war can arise from a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. The Second and Tenth Circuits hold that such a late-maturing conscientious objection can constitute such a circumstance. *United States v. Gearey,* 368 F. 2d 144 (2nd Cir., 1966), cert. denied 389 U.S. 959 (1967); *United States v. Sandbank,* 403 F. 2d 38 (2nd Cir., 1968) (dictum), *United States v. Stafford,* 389 F. 2d 215 (2nd Cir., 1968); *Keene v. United States,* 266 F. 2d 378 (10th Cir., 1959); *Martinez v. United States,* 384 F. 2d 50 (10th Cir., 1967) (dictum), cert. denied 390 U.S. 1016 (1968); *United States v. Maine,* 417 F. 2d 951 (10th Cir., 1969) (dictum).

The Fourth, Fifth, Sixth and Seventh Circuits hold to the contrary. *United States v. Al-Majied Muhammad,* 364 F. 2d 223 (4th Cir., 1966); *United States v. Helm,* 386 F. 2d 434 (4th Cir. 1967), cert. denied 390 U.S. 958 (1968); *Davis v. United States,* 374 F. 2d 1 (5th Cir., 1967); *United States v. Jennison,* 402 F. 2d 51 (6th Cir., 1968) (dictum), cert. denied 394 U.S. 912 (1969); *United States v. Taylor,* 351 F. 2d 228 (6th Cir., 1965); *United States v. Mulloy,* 412 F. 2d 421 (6th Cir., 1969), cert. granted on re-

lated issue, Oct. 1969, No. 655; *United States v. Shoebel,* 201 F. 2d 31 (7th Cir., 1953); *Porter v. United States,* 334 F. 2d 792 (7th Cir., 1964).[10]

By a split decision in *Ehlert,* the Ninth Circuit has now adopted the position of the latter circuits. In so doing, the majority of the Ninth Circuit rejected the position taken by the Second Circuit in *United States v. Gearey,* 368 F. 2d 144 (1966), that "The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments." (368 F. 2d at 150).

The most that the majority of the Ninth Circuit could say in *Ehlert* is that "Section 1625.2 . . . was enacted for the specific purpose of putting an end to the function of the Selective Service System . . . [and] requiring a person troubled with conscientious objection to state his claim before receipt of the notice to report is extremely practicable." The court failed to give effect to the nature and character of conscience, and thereby made a decision in apparent conflict not only with those circuits which have recognized conscience as an uncontrollable circumstance, but with leg-

---

[10]The First, Third and Eighth Circuits of the Courts of Appeal have not passed on the question. Reported decisions of the District Courts in those Circuits adopt the *Gearey* (Second Circuit) rule. *See, United States v. Blaisdell,* 294 F. Supp. 1303 (D. Me. 1968); *United States v. Hinch,* 292 F. Supp. 696 (W.D. Wo., 1968); *United States v. Skinner,* Cr. No. 6862, 1 Sel. Serv. L.R. 3042 (D.N.H. 1968); *United States v. Underwood,* 151 F. Supp. 874 (E.D. Pa., 1955); *United States v. Brown,* 129 F. Supp. 237 (D.N.J., 1955).

islation creating the conscientious objector exemption from military service (50 U.S.C. App., § 456(j)).

These conflicts were directly put in issue in this case by the court below, and justify the grant of certiorari to review the judgment below.

Conclusion.

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit.

Dated: April 12, 1971.

Respectfully submitted,

WILLIAM G. SMITH,
MICHAEL E. SOMERS,
DANIEL KALLEN,
DON ROSS BAY,
Attorneys for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Robert Wilson More, Defendant, Appellant. No. 25,985.

[January 13, 1971]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, KOELSCH and WRIGHT, Circuit Judges.

PER CURIAM:

Robert Wilson More appeals his conviction for refusing induction into the armed forces., 50 U.S.C. App. §462. We affirm.

Appellant had been classified I-A-O by his local board. On May 15, 1969, he received an order to report for induction on June 17, 1969. On May 27, after receipt of the order, he requested an opportunity to present new information to the board which he alleged entitled him to re-classification as a conscientious objector. The board agreed to postpone his induction and granted him a personal hearing on June 18, 1969.

Following the interview, the local board mailed him a form letter indicating that there had not been a change in his circumstances over which he had no control, as required by 32 C.F.R. §1625.2, in order to justify re-opening classification following an order to report for induction. More was then ordered to report for induction on August 12.

The August induction date was postponed at More's request. He was ultimately ordered to report on October 21, 1969 at which time he reported but refused to submit for induction.

Appellant's principal contention on appeal is that the local board in fact re-opened his classification when it granted his request for a personal hearing and that he was thereafter denied his rights to an appeal under 32 C.F.R. §1625.13. We disagree since it is clear that the local board did not re-open but rather considered More's new information to see if it constituted "circumstances over which he had no control" which is the *sine qua non* to re opening following an order to report for induction. 32 C.F.R. §1625.2.

In addition, under these facts the local board was not required to re-open. There are two possibilities here, each of which is equally likely under the showing made. That is, More's views may have crystallized either before or after he received his order to report for induction. If they crystallized before the order, it is well settled that the late filing of a previously matured conscientious objector claim does not require the local board to re-open classification. *United States v. Uhl*, ... F.2d ...., No. 25,991 (9th Cir., December 23, 1970) and cases cited therein.

If, on the other hand, More's beliefs crystallized after receipt of his orders, this court has held that such crystallization does not amount to circumstances over which the registrant has no control so as to require re-opening. *Ehlert v. United States*, 422 F.2d 332 (9th Cir. 1970) (*en banc.*), *cert. granted* 397 U.S. 1074 (1970).

Thus, the local board was not required to re-open More's classification nor did it do so and consequent-

ly he was not deprived of his rights to appeal under 32 C.F.R. §1625.13.

More's other contentions in this appeal have already been definitively decided against him:

(1) His induction order was not invalid because of the composition of his local board. All members resided within the county although three lived outside the geographical limits of the Board's jurisdiction. The former regulation[1] 32 C.F.R. §1604.52(c) is directory, not mandatory. *United States v. Berger,* .... F.2d ...., No. 25,190 (9th Cir., November 9, 1970).

(2) The proviso in 32 C.F.R. §1625.2, that the local board must find a change in circumstances over which the registrant had no control before it is required to re-open classification following an order to report for induction, is consistent with the statute. *Ehlert v. United States, supra,* at 334.

(3) Exclusion of evidence concerning More's "good faith" in refusing induction was not error. More admitted that he "fully intended not to step forward when [he was] ordered to." This admission supports a finding of the requisite intent under 50 U.S.C. App. §462. *Harris v. United States,* 412 F.2d 384, 387-88 (9th Cir. 1959).

Affirmed.

---

[1]The regulation has since been amended to require only that local board members reside within the county served by the board. Executive Order No. 11,555, 35 Fed. Reg. 14194 (Sept. 2, 1970).

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1575

ROBERT WILSON MORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of willful refusal to submit to induction, in violation of 50 U.S.C. App. 462(a). On March 2, 1970, he was sentenced to three years' imprisonment. The court of appeals affirmed. (Pet. App.)

On October 6, 1961, petitioner, at the age of eighteen, registered with his local draft board in Pasadena, California (S.S.F. pp. 1–2).[1] He was classified II–S on April 15, 1964, and, except for a short period not relevant here (S.S.F. pp. 4–8; 11, 37–38), he held

[1] "S.S.F." refers to petitioner's Selective Service file, (Government Exhibit 1), on file with this Court.

425-065—71

that classification until December 18, 1968, when he was classified 1–A (S.S.F. p. 12).

Petitioner then requested the board to send him a Special Form for Conscientious Objectors (SSS Form 150), which he received, filled out, and returned to the board on March 18, 1969 (S.S.F. p. 12). Thereafter he requested, and was granted, a personal appearance before the board members; after his appearance, the board classified him 1–A–O (S.S.F. pp. 12, 59, 69–78). On March 27, 1969, petitioner was mailed a Notice of Classification (SSS Form 110) informing him of his 1–A–O status and his right to a personal appearance and an administrative appeal (S.S.F. pp. 12, 54). No appeal was taken.

On May 15, 1969, the board mailed to petitioner an order to report for induction on June 17, 1969 (S.S.F. 12, 55). Petitioner sent the board a letter on May 27, 1969, requesting a meeting with the "appeals board," since, he claimed, after receiving his notice of 1–A–O classification he had examined his conscience and determined that he could not serve in the military in any capacity; he asked for a postponement of his induction. On June 4, 1969, the board advised petitioner that his induction was postponed until the July 1969 induction call. Two weeks later, on June 18, 1969, the board met with petitioner; at that time he requested a I–O classification, stating that he did not then believe in the Vietnam involvement and that "he had this belief about Vietnam since in his second year at college" (S.S.F. p. 63).

On June 27, 1969, the board advised petitioner that it did not specifically find there had been a change in his status resulting from circumstances over which he had no control (S.S.F. pp. 12, 64) and ordered him to report for induction (S.S.F. 13, 65). After a postponement of the induction date, petitioner reported on October 21, 1969 (S.S.F. p. 92), but when called upon to take the symbolic step forward he refused (S.S.F. pp. 95–104). The present indictment and conviction followed, and the court of appeals affirmed.

1. Petitioner challenges the Ninth Circuit's interpretation of Selective Service regulation 32 C.F.R. 1625.2, as having no application to conscientious objector claims first submitted after the mailing of a notice to report for induction. The "identical" issue (Pet. 8), however, was recently before this Court in *Ehlert* v. *United States,* No. 120, this Term, decided April 21, 1971, and the position urged in the instant petition was there rejected.

2. Petitioner's subsidiary claim—that his refusal to submit to induction was not willful—is also without substance. The argument essentially is that he was precluded from showing that in refusing induction he was acting on a "good faith" belief that his classification was invalid. To sustain a conviction under 50 U.S.C. App. 462(a), however, it is enough if the government can prove awareness of the legal obligation and deliberate purpose not to comply. *United States* v. *Boardman,* 419 F. 2d 110 (C.A. 1), certiorari denied, 397 U.S. 991. That burden was clearly met in the instant case.

As pointed out by the court below (Pet. App. 3), petitioner admitted that he "fully intended not to step forward when [he was] ordered to." Moreover, on June 18, 1969, he told the local board that he was aware of the consequences of such action, stating that the penalty was "up to five years in prison or so." (S.S.F. p. 63). On the date he refused to take the symbolic step forward, he signed a statement acknowledging that he was aware of the Act and the penalties for its violation (S.S.F. pp. 95, 115). And, when questioned by the trial judge whether he fully intended not to step forward when ordered to do so, he responded that that was correct (Tr. 126).

The issue of intent was submitted to the jury under the identical instruction upheld in *Harris* v. *United States,* 412 F. 2d 384 (C.A. 9),[2] and the jury decided the question against petitioner.[3] That determination is fully supported by the record and there is thus no cause for further review by this Court.

---

[2] The trial judge charged (Tr. 262–263): "With respect to crimes such as the one charged in this case, specific intent must be proved before there can be a conviction. A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent. An act or failure to act is 'knowingly' done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. I further instruct you that bad purpose means that if you find beyond a reasonable doubt that the defendant understood that he was required to submit to induction and refused to submit, then he could have a bad purpose if he refused to do so."

[3] The exclusion by the trial judge of evidence of petitioner's motives in challenging a law petitioner considered invalid was plainly proper. As this Court stated long ago in *Warren* v.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

United States, 177 F. 2d 596, 600: "A person may not decide for himself whether a law is good or bad and if bad, that he is free to disobey it." Nor do the decisions in *Morrissette* v. *United States*, 342 U.S. 246, and *United States* v. *Murdock*, 290 U.S. 389, cited by petitioner, in any way undermine that principle. They do not stand for the broad proposition that one who bases his action on a *bona fide* belief in the illegality of government conduct is immune from prosecution, but rather that Congress intended to impose criminal sanctions only for intentional acts and not for mistakes or misunderstandings.

U.S. GOVERNMENT PRINTING OFFICE: 1971

CERTIORARI DENIED